

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 5, 2016

**Elisabeth A. Shumaker
Clerk of Court**

In re: PETER COMPTON,

Movant.

No. 16-1280
(D.C. No. 1:07-CV-02363-WYD)
(D. Colo.)

ORDER

Before **HOLMES, MATHESON, and MORITZ**, Circuit Judges.

Peter Compton, a Colorado state prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 habeas application challenging his conviction on one count of first-degree murder for which he is serving a life sentence without the possibility of parole. He filed a first § 2254 application in 2007, raising the following claims: “(1) the jury was incorrectly instructed on the ‘after deliberation’ element of the charge; (2) the trial court refused to replace a juror who allegedly slept through portions of the trial; (3) there were several errors in the admission and presentation of DNA evidence at his trial; (4) trial counsel provided ineffective assistance relating to the DNA evidence; and (5) the state court erred in deeming several of his post-conviction claims to have been abandoned.” *Compton v. Hartley*, 372 F. App’x 841, 842 (10th Cir. 2010). The district court denied relief, and we denied a certificate of appealability.

Compton's habeas application cannot proceed in the district court without first being authorized by this court. *See* 28 U.S.C. § 2244(b)(3). We may authorize a claim only if the prisoner has not raised it in a previous § 2254 habeas application. *See id.* § 2244(b)(1). And we may not authorize a new claim unless it satisfies one or both of the requirements specified in § 2244(b)(2). A new claim must rely on (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) a factual predicate that "could not have been discovered previously through the exercise of due diligence" and that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.* § 2244(b)(2)(A)-(B).

Compton must make a *prima facie* showing that he can satisfy these gate-keeping requirements. *See Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013). "If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application." *Id.* (internal quotation marks omitted).

Compton asserts that he has new claims that are based on newly discovered factual predicates. But one of his claims is not new. He argued in his first § 2254 application that his trial counsel provided ineffective assistance in failing to seek the exclusion of expert DNA testimony based on a lack of foundation. Under § 2244(b)(1), Compton may not raise this claim again in a second or successive habeas application. As to the rest of his claims, he fails to demonstrate a *prima facie* case for authorization under

§ 2244(b)(2)(B) either because he identifies no newly discovered factual predicate or his new facts do not establish his innocence by clear and convincing evidence, *see Case*, 731 F.3d at 1035.

Compton asserts that the state prosecutor and the lead detective in his criminal case were involved in an intimate relationship, which, he contends, raises serious doubt as to whether his due process rights were violated. He claims further that his trial counsel was aware of this relationship and was ineffective in failing to bring it to the trial court's attention. Compton alleges that he first learned of the relationship between the prosecutor and the detective through his counsel's investigation prior to the filing of his second post-conviction motion in state court. Although it is not entirely clear from Compton's motion for authorization, we infer that this investigation did not occur until after he filed his first § 2254 application in 2007.

But even assuming that Compton could not have discovered the existence of this relationship earlier through the exercise of due diligence, he has not demonstrated that proof of the relationship when "viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," *id.* § 2244(b)(2)(B)(ii). The fact of a relationship between the prosecutor and the lead detective is not, in itself, exculpatory, and aside from speculation, Compton does not tie the existence of the relationship to any evidence introduced or excluded at his trial in violation of his constitutional rights. *See Case*, 731 F.3d at 1034. He therefore fails to show that the new fact underlying his constitutional claims—specifically, an intimate

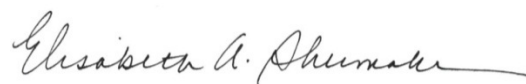
relationship between the prosecutor and the lead detective—establishes his innocence, as required under § 2244(b)(2)(B)(ii). *See Case*, 731 F.3d at 1035.

Compton also asserts claims of prosecutorial misconduct and ineffective assistance of counsel in allowing the presentation of perjured testimony by the state's expert witness on the DNA evidence. He contends that he discovered the factual predicate for these claims when the state appellate court recently quoted certain trial testimony in affirming the denial of one of his post-conviction motions. Compton maintains that he could not have discovered the relevant facts sooner because the state denied his previous requests for the trial transcript. We are not persuaded because the testimony in question was presented at Compton's trial. He therefore fails to satisfy the gatekeeping requirement in § 2244(b)(2)(B)(i) with regard to these claims.

Lastly, Compton does not identify any newly discovered factual predicate underlying the remainder of his claims. He argues, for example, that his counsel in his first state post-conviction proceeding was ineffective in failing to raise all of his claims during an evidentiary hearing. As a result, he contends, numerous claims were not exhausted in the state courts and he was unable to bring them in his first § 2254 application. But Compton was aware of the factual predicate underlying this ineffective-assistance claim when the state district court deemed his claims abandoned in denying his first post-conviction motion in 2005. Therefore, to the extent that Compton relies on his counsel's alleged ineffective assistance as the newly discovered factual predicate for any of his proposed claims, he again fails to satisfy the gatekeeping requirement in § 2244(b)(2)(B)(i).

Compton's motion for authorization is denied. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk